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Submitted to the
Subcommittee on Workforce Protections
House Committee on Education and Workforce

"The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities"

Tuesday, March 25, 2025

Chairman Mackenzie, Ranking Member Omar, and Subcommittee Members, thank you for the opportunity to testify about the Fair Labor Standards Act of 1938 (FLSA), a law that impacts many businesses and employees across the country. This hearing is a major step in the right direction, kicking off the necessary conversations that seek to balance the rights, responsibilities and obligations of all parties under this vital law.

I am honored to offer this testimony in my capacity as the State Council Legislative Director for Maryland SHRM, bringing over 10 years of advocacy on behalf of SHRM and over 15 years of human resources (HR) experience. SHRM empowers people and workplaces by advancing HR practices and maximizing human potential. For over 75 years, SHRM has been the trusted authority on all things work. SHRM is the foremost expert, researcher, advocate, and thought leader on issues and innovations impacting today's evolving workplaces. With nearly 340,000 members in 180 countries, SHRM touches the lives of more than 362 million workers and their families globally. In Pennsylvania and Minnesota, SHRM has more than 12,500 members and nearly 6,000 members, respectively.

SHRM has an extensive affiliate network covering all 50 states and several territories, comprising nearly 550 chapters and 51 state councils. This broad reach enables SHRM to deliver localized support, resources, and networking opportunities to HR professionals nationwide. Furthermore, each chapter acts as a center for professional development, hosting events, certification courses, and legislative updates tailored to its members' needs. A key part of this network is the role of

SHRM State Council Legislative Directors, who lead advocacy efforts within their states by tracking key legislation, mobilizing SHRM members, and engaging with policymakers to advance workplace policies that support both employers and employees.

Members of the Subcommittee on Workforce Protections ("Subcommittee"), federal law must evolve to bridge the gap between how organizations assess their needs, find the right talent, and meet that talent where they work and thrive. Unfortunately, outdated laws like the FLSA are holding back organizations and the American workforce, blocking us from reaching our fullest potential.

To unlock the full potential of the American workforce, SHRM believes we must turn three essential keys to update FLSA: **modernizing pivotal workplace policies**, **closing the workforce participation gap** and **shaping the future of work**. These action items are not just priorities—they are the levers that will open doors to innovation, economic growth, and a more dynamic, competitive workforce.

SHRM's "Key" Priorities

SHRM's key priorities aim to create a world of work that works for all, and SHRM believes that addressing these challenges is a shared responsibility. To maintain economic competitiveness and ensure the U.S. remains a global leader, all interested stakeholders must come together to promote policies that modernize pivotal workplace policies that currently limit opportunities based on rigid and outdated classifications. This is how we can work towards closing the workforce participation gap and positively shaping the future of work.

I hope my testimony demonstrates to the Subcommittee that when laws fail to keep up with the evolving needs of U.S. workplaces, it can lead to unintended consequences that impact the entire economy.

Before I begin, let's not undersell how impactful the FLSA has been for nearly a century. It is undoubtedly the cornerstone of federal labor law and establishes many of the protections that are now commonplace to modern employees, such as a minimum wage, overtime pay, and child labor protections. However, the world has undergone significant changes since the FLSA was first passed and since Congress last made significant changes to the law. It has not been amended to account for significant differences in the way workers work or the kinds of work they perform. These changes necessitate federal and legislative solutions that prioritize clarity on which workers are covered, consistency in its application, and compliance-oriented language that reflects today's workforce and workplace.

Modernize Workplace Laws:

According to SHRM's 2025 State of the Workplace research report, 2024 was defined by talent shortages, technological advancements, and a rapidly evolving landscape, driving organizations to prioritize recruiting efforts while also focusing on employee experience and leadership as well as manager development to enhance and retain scarce top talent.[1] As the world of work continues to evolve rapidly, organizations must make strategic decisions to meet labor market demands.

[1] SHRM's 2025 State of the Workplace

As organizations continue to make these strategic decisions, this progress is governed by decades-old laws that have not been updated to reflect technological and workplace advancements. Simply put, the FLSA has not kept up with the changing nature of work, creating increased tension between operational needs, worker flexibility, and compliance requirements. Part of this tension stems from the lack of clear statutory language, which may not have been necessary in 1938 but is crucial today. When the FLSA was created much of its language and structure were based on the work environment of that era, which has evolved considerably. First published in 1939, the U.S. Department of Labor's (DOL) "Dictionary of Occupational Titles" defined over 13,000 types of work. Today, the Alphabetical Indexes of Industries and Occupations list more than 21,000 industry titles and 31,000 occupation titles.

In the absence of clear statutory language, regulatory agencies have stepped in to provide guidance on critical workplace issues. However, with a lack of movement in Congress, these agencies have taken on an outsized role in shaping policies related to FLSA coverage and the impact of technological advancements on work. The frequent proposing and publishing of new regulatory interpretations, followed by lawsuits challenging their lawfulness, creates uncertainty for workers, organizations, and HR professionals. These stakeholders are often left grappling to understand what the rules are, and how to build sustainable compliance structures amidst concerns that the rules will shift in a couple of years. While some organizations—with dedicated departments to track these types of regulatory and legal shifts—are equipped to handle these shifts, that is not the same for all organizations. This is particularly true for small to medium-sized organizations or organizations where they have an HR department of one, a singular person charged with the day-to-day operations. Businesses of all sizes need certainty and the best way to achieve that certainty is through legislation that creates the necessary framework for us all to operate under.

Worker Classifications:

First and foremost, I urge the Subcommittee to consider how the absence of a clear and uniform statutory definition of "employee" impacts the world of work and the type of data that can be collected. This fundamental question carries significant legal, tax, and benefits implications for employers and workers alike. However, the interpretation of this fundamental concept has been left to various federal regulatory agencies and the courts, leading to differing applications across various laws, administrations, and courts.

The FLSA defines an "employee" as "any individual employed by an employer," with "employed" further defined as "to suffer or permit to work."[2] The parameters of who falls into the definition of an "employee" under the FLSA have been the subject of court interpretations since the law was effective. In an opinion of the Supreme Court of the United States ("the Supreme Court"), it was noted that the FLSA has "no definition that solves problems as to the limits of the employer-employee relationship under the [FLSA]."[3]

The consequences of this have been well noted. According to a December 2023 U.S. Government Accountability Office (GAO) report, "[T]he tests federal entities use to determine whether a

[2] Fair Labor Standards Act, 29 U.S.C. § 203(e)(1), (g).
[3] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

worker is an independent contractor, or an employee are complex and differ from law to law."[4] In explaining the different metrics used:

> For example, [the Internal Revenue Service] generally relies on factors cited by courts, such as relevant case law, including the degree of control an employee has over their behavior and finances. In contrast, according to DOL' s Wage and Hour Division, under the Fair Labor Standards Act, a worker is an employee and not an independent contractor if economically dependent on an employer for work.[5]

Additionally, in noting the various aspects of nonstandard and contract work arrangements, as well as the fragmented nature of data collection, the GAO report stated that the data does not provide a cohesive national perspective on such arrangements. This issue will only intensify as work arrangements become "more varied and complex, and federal entities use numerous, varied terms to describe them."[6] Echoing GAO's concern, the complexity of this issue will continue to grow as both organizations and workers need clarity on whether a worker qualifies as an employee, given the significance of this determination.

Over 70 years ago, in 1947, the Supreme Court, in Rutherford Food Corp. v. McComb, established the economic realities factors as relevant in determining whether a worker is an employee or an independent contractor under the FLSA. Since then, the Supreme Court has neither reaffirmed nor rejected the application of these factors in determining employee status under the FLSA.

Instead, in just the past five years, regulations issued by the DOL's Wage and Hour Division (WHD) on worker classification have undergone multiple changes, raising questions about the role of regulatory guidance. A new rule was first proposed in September 2020 and finalized in January 2021, only to be delayed in March 2021 and face an attempted withdrawal in May 2021. Both actions were challenged in court, and in March 2022, the original January 2021 rule was reinstated. Shortly thereafter, WHD sought to change the rule again, publishing a proposed rule in October 2022, to which SHRM and 26 SHRM State Councils submitted a public comment. A new rule was finalized and published in January 2024, replacing the existing rule. That rule is now being challenged in multiple lawsuits. Notably, no rule providing guidance on the application of the independent contractor test to today's workforce has been in effect without legal uncertainty.

In response to this noted issue, I would like to turn the Subcommittee's attention to the legislative attempts to provide a statutory framework to determine if a worker is an employee or an independent contractor, such as the newly reintroduced bill to amend the FLSA and the National Labor Relations Act (NLRA) to clarify the standard for determining whether an individual is an employee, and for other purposes (The Modern Worker Empowerment Act, H.R.1319). This bill provides a great launching point and opens the door to an important conversation. It also addresses an important need to offer clarity, certainty, and consistency in structuring worker relationships, without granting favor to any one type of designation. Aligning the FLSA and NLRA on this key threshold issue would help reduce confusion for organizations that must comply with both laws. A

[4] U.S. Government Accountability Office, *Work Arrangements: Improved Collaboration Could Enhance Labor Force Data*, GAO-23-104225 (Washington, D.C.: U.S. Government Accountability Office, December 2023).
[5] Id at 12.
[6] Id at 33.

uniform definition of "employee" across these statutes would provide clarity, ensuring employers and workers understand their rights and obligations.

Overtime Exempted Status:

Second, I would draw the Subcommittee's attention to the rules and regulations governing the determination of overtime-exempt status. I invite the Subcommittee to assess whether certain longstanding definitions may need to be updated to better reflect today's workforce and workplace realities. I pose this question because establishing their status as overtime-exempt or nonexempt is nearly as important as determining whether a worker is an employee.

The determination of an employee's exempt or nonexempt status for purposes of overtime is imperative for businesses looking to make long-term strategic decisions as it correlates with an organization's bottom line, benefit offerings and more. In my professional capacity and on behalf of SHRM's membership—who are uniquely positioned to navigate the complexities of overtime policies—this determination extends beyond an employee's salary and affects a range of business considerations. Employers must carefully classify employees, as these decisions influence broader workforce strategies, including compensation structures, pay rates, work schedules, workplace settings, and overall workforce composition, such as hiring full-time, part-time, temporary, or independent workers. These decisions also affect workforce morale, as some employees prefer exempt status for the flexibility and associated benefits it provides.

SHRM's survey on the 2023 proposed overtime rule, to which SHRM submitted a public comment alongside 27 SHRM State Councils, highlighted the significant effort required to classify or reclassify employees. To comply with this rule, which would have increased the salary threshold for Executive, Administrative, and Professional (EAP) employees, SHRM's research found that 64.5% of respondents would have conducted case-by-case analyses of salary levels and hours worked to determine the appropriate pay adjustments.[7] For employees transitioning to nonexempt status, respondents indicated that new timekeeping policies would be necessary, as 63% of organizations currently do not track the hours of exempt salaried workers, underscoring the added administrative burden of compliance.[8]

The determination of EAP (or white-collar) exempt status relies on three equally important tests: the salary basis, salary threshold, and duties tests. Each designation requires its own duties analysis, with relaxed requirements for highly compensated employees earning above a certain threshold. While salary thresholds have been a major topic of discussion over the past decade—rightfully so, as they help distinguish exempt from obviously nonexempt employees—another critical aspect deserves attention: the duties test.

As job roles evolve, requiring new skills and greater judgment, certain employees increasingly meet the criteria for exemption under the administrative classification. To qualify:

[7] Overtime Rule Toplines, SHRM, 2023 (unpublished).
[8] Id.

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[9]

The second criterion often creates confusion, as many employees rightly believe their roles involve significant judgment. In the mortgage industry, for example, loan officers assess borrowers' financial situations to determine appropriate mortgage products—clearly exercising discretion.

This issue exemplifies the ongoing back-and-forth between regulatory agencies and the courts. A 2006 interpretative letter confirmed loan officers qualified under the administrative exemption, but in 2010, the Department of Labor withdrew that guidance, leading to litigation in *Perez v. Mortgage Bankers*.[10] In 2015, the Supreme Court ruled that the withdrawal was lawful, as it constituted interpretative guidance. The Court held that agencies are not required to follow notice-and-comment procedures when issuing interpretative rules and should not be obligated to do so for subsequent reinterpretations, as occurred in this case. This case highlights how shifting agency policies, driven by different administrations, can create industry uncertainty, forcing organizations to adapt quickly.

Another example where regulations have fallen out of touch with common understanding is the 1996 regulation for "Computer Employee" for purposes of overtime-exempt status. Thinking about where technology was in 1996, and the way that technology has evolved exponentially in that time, this exemption is inherently outdated. "Further, computer technology's growth and diversification have significantly transformed the nature of work in the computer field, and traditional roles like computer programmers and software engineers have evolved and expanded into other specialized areas such as data science, cybersecurity, cloud architecture, and continually emerging jobs related to AI and machine learning. These areas were not contemplated when the "Computer Employee" exemption was codified in 1996. It would provide clarity and certainty to HR professionals for the FLSA's computer employee exemption to reflect the common understanding and current state of computer-related occupations.

Similarly, the definition for "Outside Sales Employee" exemption has not kept pace with the advancement of technology, which has made the concept of what is considered "outside" to be muddled, as technology enables a physical "home base" to be nonessential in the modern world of work. This is another area where the spirit of the law and the letter of the law are not completely aligned, which can create ambiguity.

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[9] *Fact Sheet #17A: Exemption for executive, administrative, professional, computer & outside sales employees under the Fair Labor Standards Act (FLSA)*. Retrieved March 20, 2025, from https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime

[10] 575 U.S. 92 (2015).

Given the significant time and resources required to properly classify employees—and the risks associated with misclassification—it is crucial that definitions and tests are clear and easily understood by both employers and employees. When classification frameworks become outdated or are overly rigid, the legal language no longer reflects how positions are actually structured in the modern workplace. It is essential for Congress and the WHD to regularly review and update these standards, as many aspects of today's labor landscape—such as remote work and the rise of contract arrangements—were not only uncommon but unimaginable just a decade ago. There is an opportunity to examine how definitions, regulatory tests, and criteria for various overtime-exempt statuses impact the modern workforce and create challenges for efficient business operations.

Continuous Workday Doctrine:

Finally, I urge the Subcommittee to consider modernizing an important but poorly defined term: compensable time. While the FLSA ensures employees are properly compensated for their work, it does not clearly define what constitutes compensable time. Instead, it outlines non-compensable activities, such as commuting and certain preliminary or postliminary tasks. This made sense when the FLSA was crafted for a different era and workforce. However, work has evolved significantly, and the framework for defining compensable time—impacting minimum wage, overtime, break time, and leave compliance—no longer reflects modern work arrangements.

Under the FLSA, the "workday" is defined as the period between an employee's first and last principal activities, whether or not they are working throughout. This "continuous workday" doctrine does not account for today's reality, where employees have greater flexibility in when and where they work. Remote work, flexible scheduling, and organizations allowing employees to work nontraditional hours have transformed the concept of a workday in ways unimaginable when the FLSA was enacted. In 2024, SHRM research found that 70% of employers recognized flexible work arrangements as "very important" or "extremely important" for the third consecutive year.[11] Additionally, the prevalence of flextime during core business hours (allowing employees to choose their work hours within limits during core business hours) has remained relatively stable over the past few years, with 53% of organizations offering it in 2024, down 1 percentage point from 54% in 2023, but up 3 percentage points from 2020.[12] This presents an opportunity to adopt a more flexible, practical interpretation of the continuous workday rule that does not rely on outdated assumptions. Regulations should evolve to provide clarity and consistency for employers and employees, ensuring workplace policies align with modern work structures.

Close the Workforce Participation Gap:

America has a talent problem—not due to a lack of talent, but because workers are not being connected with the skills needed for today's workforce. SHRM has long highlighted this labor mismatch, which is now exacerbated by a widening workforce participation gap, often reflected in employment disparities among different groups.

With the constant evolution of the workplace, the need to upskill and reskill all workers is paramount. SHRM research found that 1 in 4 organizations report hiring for full-time positions that require new skills, and among them, 76% struggle to find qualified candidates.[13] Given this

[11] Employee Benefits Survey, SHRM, 2024
[12] Id.
[13] 2024 Talent Trends, SHRM, 2024.

reality, federal law should facilitate workforce development, not create unnecessary barriers. Yet, under the FLSA, offering upskilling opportunities can unintentionally impact employment status, deterring businesses from investing in workforce development. If the risk of inadvertently establishing an employment relationship is too high—due to shifting and unclear regulations—companies may forgo these opportunities altogether, particularly for workers outside traditional employment relationships. SHRM research found that 47% of HR professionals say their organization does not provide training to their independent workers, and among organizations that do provide training to their independent workers, the most common types of training offered are orientation/onboarding training (59%) and compliance training (51%).[14]

This issue affects both employers and independent workers, who play a crucial role in the U.S. economy. The Senate Health, Education, Labor, and Pensions Committee's Request for Information (RFI) last year explored how legal ambiguities around worker classification harm independent workers and the broader economy. In SHRM's response, we emphasized that independent contracting benefits both workers and businesses, fostering we emphasized that independent contracting benefits both workers and businesses, fostering entrepreneurship and small business formation. These workers provide companies with on-demand, highly specialized talent, helping bridge workforce gaps. The law must acknowledge that some workers choose to remain outside traditional employment structures for a variety of reasons, including the ability to be their own boss and the flexibility to set their own schedules. SHRM believes that these workers should not needlessly be cut off from benefits because of that choice.

Beyond classification issues, outdated legal definitions may also restrict benefits for employees. For example, the calculation of an employee's regular rate for overtime pay has not kept pace with evolving compensation structures. One solution proposed in the last Congress, the Empowering Employer Child and Elder Care Solutions Act, would have excluded employer-funded dependent care from an employee's regular rate, encouraging companies to offer these benefits. This is of particular interest, as SHRM research indicates that at least 80% of working caregivers anticipate the care they provide to be long-term and, looking forward, within the next 5 years, 14% anticipate taking on new or additional adult care responsibilities, and 18% anticipate taking on new or additional eldercare responsibilities.[15] The pressures of caregiving on the workforce are not expected to slow or narrow. As employees juggle caregiving responsibilities across generations, the law should promote—not hinder—expansive benefit offerings.

To close the workforce participation gap, laws must support employer strategies for attracting and retaining talent. This includes enabling flexible schedules, learning opportunities, and nontraditional work arrangements.

Shape the Future of Work:

Preparing for the future of work is essential for organizations to stay competitive. Employers must stay informed about how these changes will affect their workplaces, while workers need to understand the skills they must acquire to remain competitive in an evolving job market.

The constant back-and-forth shifts in fundamental regulatory concepts create significant challenges for companies trying to establish long-term strategic goals and plans. When each

[14] DOL Independent Contractor Ruling, SHRM, 2022.
[15] Caregiving Research, SHRM, (forthcoming).

administration introduces new regulatory guidance on critical issues such as worker classification or joint employer status, businesses are left navigating an unpredictable landscape. How can an organization be expected to set budgets, design benefits, and develop a sustainable talent strategy when the very foundation of these decisions keeps shifting? "Without stability, businesses struggle not only to plan for the future but also to attract, retain, and train the workforce they need to meet evolving demands. If organizations cannot confidently structure their workforce, how can they invest in talent development or create career pathways that support both business success and worker mobility?

Likewise, current and future workers—who are consistently advised to upskill and remain adaptable in an evolving job market—face a similar dilemma. How can they prepare for long-term success when the rules governing fundamental concepts related to work are constantly rewritten? The lack of clarity hinders both employer and worker decision-making, ultimately stifling economic growth, job creation, and the ability of businesses and workers alike to thrive in the modern economy.

Policymakers should support initiatives that ensure organizations can meet the complex demands of the modern workplace. As AI and technology advance, we must ensure a workforce capable of creating and maintaining these innovations. This includes recognizing independent workers and employees alike and ensuring laws support updated training opportunities.

Conclusion:

Forward-thinking changes to the FLSA will empower employers to design benefits and workplace policies that meet talent where they are—ensuring a dynamic, adaptable, and future-ready workforce.

SHRM and its members are committed to partnering with the Subcommittee and serving as a unifying force in its efforts on critical issues within its jurisdiction. We look forward to continuing discussions on these and other matters affecting work, workers, and the workplace. Thank you again for holding this hearing and for the opportunity to speak with you.